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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(Oakland Division)

REGINALD DICKERSON, LLOYD HALL,
BRANDON REED AND HARRISON
BROWN.

Plaintiffs.

V.

CAL WASTE SOLUTIONS, JIMMY
DUONG, RUTH LUI, OSCAR RAMIREZ,
STAN BEAL, RICH GROGAN and DOES 1-
50.

Defendants.

Case No. **CV 08 3773 WDB**

**NOTICE OF MOTION AND MOTION
TO DISMISS PURSUANT TO F.R.C.P.
12(B)(6), OR, IN THE ALTERNATIVE,
TO COMPEL ARBITRATION;
MEMORANDUM OF POINTS AND
AUTHORITIES: PROPOSED ORDER**

Date: October 2, 2008

Time: 1:30 p.m.

Dept: Courtroom 4, 3rd Floor, 1301 Clay St.,
Oakland, CA 94612-5212

Complaint filed: July 18, 2008

Trial date: None

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1 TO: ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 2, 2008 at 1:30 p.m., or as soon thereafter as
3 the matter may be heard, in Courtroom 4, 3rd Floor, located at 1301 Clay Street, Oakland, CA
4 94612, or such other department to which the Court may assign to this matter, all Defendants
5 will and do hereby move the above-entitled Court for an order dismissing the Complaint of
6 Plaintiffs or, in the alternative, for an order compelling arbitration of the claims set forth in the
7 Complaint.

8 This motion is brought pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6), based
9 upon Section 301 of the Labor Management Relations Act, and upon such other and further
10 authorities set forth in the attached Memorandum of Points and Authorities filed herewith.

11 Specifically, this motion to dismiss, or, in the alternative, to compel arbitration, seeks
12 relief as follows:

13 (1) Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth
14 Cause of Action should be dismissed as, among other things, these claims are Plaintiffs have
15 failed to exhaust their grievance remedies under the Teamsters Collective Bargaining
16 Agreement, these Plaintiffs have failed to allege exhaustion of their administrative remedies, and
17 have further failed to state legally cognizable causes of action for sexual harassment, hostile
18 work environment and sexual battery;

19 (2) In the alternative, arbitration is mandatory under the Collective Bargaining
20 Agreement and therefore if the Court is not inclined to dismiss this matter, the Court is
21 nevertheless respectfully requested to order the matter to arbitration and to stay and hold the
22 action in abeyance.

1 This motion shall be based upon this Notice of Motion, the Memorandum of Points and
 2 Authorities, the Plaintiffs' Complaint and exhibits thereto (attached to the Notice of Removal
 3 filed by Defendants) the files and records of this action and such other and further oral and
 4 documentary evidence as may be introduced or referred to at the hearing on this matter.

5 Dated: August 12, 2008

6 LAW OFFICES OF WALLACE C. DOOLITTLE

7 /S/
 8 Wallace C. Doolittle, Esq.
 9 Attorneys for Defendants CALIFORNIA WASTE
 10 SOLUTIONS, INC., a California corporation (sued
 11 incorrectly herein as "CAL WASTE SOLUTIONS"),
 12 JIMMY DUONG, RUTH LIU (sued incorrectly as "RUTH
 13 LUI"), OSCAR RAMIREZ, STAN BEALE (sued
 14 incorrectly herein as "STAN BEAL") and RICH GROGAN

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION/FACTS:**

17 Defendant CALIFORNIA WASTE SOLUTIONS, INC., a California corporation,
 18 ("CWS") is a recycling company, with locations in Oakland and San Jose. The other Defendants
 19 are current or past employees of the company.

20 Plaintiffs are either current or past employees. Each of the Plaintiffs either was or is a
 21 curbside recycling collection truck driver. All the Plaintiffs are members of International
 22 Brotherhood of Teamsters, Local 70 (the "Teamsters"). At all material times the Teamsters and
 23 CWS were parties to an effective and current Collective Bargaining Agreement ("CBA").¹

24
 25
 26 ¹ Plaintiffs sue CWS for, among other things, breach of the Teamsters CBA. [See, Complaint,
 27 ¶¶46, 47, 51.]

1 The Complaint for, inter alia, the deprivation of plaintiffs' civil rights was filed in the
2 State Court of California in and for the County of Alameda. The Defendants filed a Notice of
3 Removal on August 7, 2008. The Plaintiffs' Complaint involves four individuals whom the
4 Complaint alleges are members of "a protected class." See paragraphs 1 through 4 of the
5 Complaint filed July 18, 2008 (hereinafter "Complaint"). A copy of the Complaint is attached to
6 Defendants' Notice of Removal as Exhibit A, filed herein.
7

8 The Complaint cites 42 U.S.C. §1981 (in addition to California Government Code
9 §12900 et seq.) and states that these statutes prohibit employers from sexually harassing
10 employees, discriminating against employees and retaliating against employees. See paragraph 5
11 of the Complaint.
12

13 The Complaint alleges that the defendants "had little or no respect for state and federal
14 laws regarding discrimination" and attempts to imply that the defendants "intentionally mislead"
15 the plaintiffs as to where the provisions on non-discrimination "could be found and the extent of
16 their non-discrimination policy." See paragraph 31 of the Complaint attached. Paragraph 31 cites
17 Exhibit A of the Complaint as supporting these allegations, which are the "Collective Bargaining
18 Agreement Between Sanitary Truck Drivers and Helpers, Local #350, IBT and California Waste
19 Solutions of San Jose, CA, Drivers/Mechanics, 2007-2013", and "Agreement Between
20 Brotherhood of Teamsters, Local No. 70 and California Waste Solutions." The copy of the
21 agreement with Local #70 states that it was made and entered into in 1994, and reprinted in
22 1998. See Exhibit A of the Complaint, filed herein. Article 20 of the Collective Bargaining
23 Agreement regarding Local #350 cites the Americans with Disabilities Act (along with the
24 California Fair Employment and Housing Act).

25 Each Collective Bargaining Agreement contains a grievance and arbitration section.
26 Article 21 in the agreement with Local #350 and Article 14 in the agreement with Local #70
27 each require that grievances be reduced to writing within a specified time. The Complaint fails to
28

1 allege that the plaintiffs complied with the required grievance procedures, and fails to state that
 2 the plaintiffs exhausted their administrative remedies. The Complaint fails to allege that any of
 3 the plaintiffs sought arbitration of any of the issues raised in the Complaint. See Exhibit A of the
 4 Complaint.

5 The Plaintiffs allege that the Defendants violated the relevant Collective Bargaining
 6 Agreements. See, e.g., Paragraphs 26, 39, 46, 54, 62, 67, 70, 79 and 85 of the Complaint. These
 7 paragraphs of Plaintiffs' Complaint are discussed below. Under 28 USC § 1441(c) the
 8 Defendants gave notice of removal of this action to federal court. California Practice Guide,
 9 *Federal Civil Procedure Before Trial*, (2008) TRG, 2:604.

10 The Plaintiffs allege that the Defendants violated federal law. See, e.g., Paragraphs 5, 31,
 11 32, 33, 67, and 70. Under 28 USC § 1441(b) (federal question) the Defendants gave notice of
 12 removal of this action to federal court. *Harris v. Birmingham Board of Education* (11th Cir.
 13 1987) 817 F2d 1525, 1526, California Practice Guide, *Federal Civil Procedure Before Trial*,
 14 (2008) TRG, 2:841.

15 **II. PLAINTIFFS' ACTION MUST BE DISMISSED**

16 **A. 12(B)(6) STANDARD**

17 A Rule 12(b)(6) motion tests the legal sufficiency of the claims stated in the
 18 complaint. The Court must decide whether the facts alleged, if true, would entitle the Plaintiffs to
 19 some form of legal remedy. Where, as here, the answer is unequivocally "no," the motion must
 20 be granted. *Conley v. Gibson* (1957) 355 US 41, 45-46, 78 S.Ct. 99, 102; *De La Cruz v. Tormey*
 21 (9th Cir. 1978) 582 F2d 45, 48; see California Practice Guide, *Federal Civil Procedure Before*
 22 *Trial*, (2008) TRG, 9:187. A rule 12(b)(6) dismissal is proper where there is either a "lack of a
 23 cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal
 24 theory." *Balisteri v. Pacifica Police Dept.* (9th Cir. 1990) 901 F2d 696, 699; see California
 25 Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 9:187. Unless the court
 26 converts a Rule 12(b)(6) motion into a summary judgment motion, or the defense is apparent
 27 from matters of which a court may take judicial notice, the court cannot consider material outside
 28

1 the complaint (e.g., facts presented in briefs, affidavits or discovery materials). *Arpin v. Santa*
 2 *Clara Valley Transp. Agency* (9th Cir. 2001) 261 F3d 912, 925; California Practice Guide,
 3 *Federal Civil Procedure Before Trial*, (2008) TRG, 9:211. Material properly submitted with the
 4 complaint (i.e., exhibits under FRCP 10(c)) may be considered as part of the complaint for
 5 purposes of a Rule 12(b)(6) motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.,*
 6 *Inc.* (9th Cir. 1990) 896 F2d 1542, 1555; California Practice Guide, *Federal Civil Procedure*
 7 *Before Trial*, (2008) TRG, 9:212.

8 **B. FEDERAL LABOR LAW COMPLETELY PREEMPTS THE STATE LAW
 9 CLAIMS IN THE COMPLAINT**

10 A federal statute that does not expressly preempt state law may do so impliedly. See
 11 California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 1:690. Implied
 12 preemption is found where the federal statute regulates a field that Congress intended to be
 13 occupied exclusively by the federal government. See *Freightliner Corp. v. Myrick* (1995) 514
 14 US 280, 287, 115 S.Ct. 1483, 1488. When Congress has legislated so comprehensively in an area
 15 that federal law occupies the entire field, leaving no room for state regulation, state law is
 16 impliedly preempted. See California Practice Guide, *Federal Civil Procedure Before Trial*,
 17 (2008) TRG, 1:690 and *Pacific Gas & Elec. Co. v. State Energy Resources Conservation &*
 18 *Develop. Comm'n* (1983) 461 US 190, 204, 103 S.Ct. 1713, 1722. Section 301 of the Labor
 19 Management Relations Act (LMRA) provides that “(s)uits for violation of (collective bargaining
 20 agreements) ... may be brought in any district court ...” See California Practice Guide, *Federal*
 21 *Civil Procedure Before Trial*, (2008) TRG, 1:692; 29 U.S.C. §185(a) [parenthesis added]. This
 22 has been construed to preempt state law on claims that require interpretation of a collective
 23 bargaining agreement. See *Lingle v. Norge Div. of Magic Chef* (1988) 486 US 399, 403-406, 108
 24 S.Ct. 1877, 1880-1881.

25 **C. THE DOCTRINE OF COMPLETE PREEMPTION REQUIRES
 26 DISMISSAL OF ALL STATE LAW CLAIMS**

27 A Rule 12(b)(6) motion to dismiss for failure to state a claim may be used when, as here,
 28 the Plaintiffs have included allegations in the Complaint that, on their face, disclose some

1 absolute defense or bar to recovery: "If the pleadings establish facts compelling a decision one
 2 way, that is as good as if depositions or other expensively obtained evidence on summary
 3 judgment establishes the identical facts." *Weisbuch v. County of Los Angeles* (9th Cir.) 119 F3d
 4 788, fn. 1; *Quiller v. Barclays American/Credit, Inc.* (11th Cir. 1984) 727 F2d 1067, 1069;
 5 *Hearn v. R.J. Reynolds Tobacco Co.* (D AZ 2003) 279 F.Supp.2d 1096, 1102 (citing text); see
 6 California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 9:193.

7 The "complete preemption" doctrine is limited primarily, as is the matter here, to state
 8 law claims that are displaced by the Labor Management and Relations Act. California Practice
 9 Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:726.1. Where federal law
 10 completely preempts a state law claim, the action may be removed to federal court *even if federal*
 11 *law fails to provide plaintiff with remedies available under state law*, or a nonjurisdictional
 12 *defense completely bars* the federal claim. See *Young v. Anthony's Fish Grottos, Inc.* (9th Cir.
 13 1987) 830 F2d 993, 999; California Practice Guide, *Federal Civil Procedure Before Trial*,
 14 (2008) TRG, 2:724. Under such circumstances, the district court should *dismiss* the federal claim
 15 (not remand to the state court). See *Young v. Anthony's Fish Grottos, Inc.*, *supra*, 830 F2d 993 at
 16 999; California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:724.

17 A common application of "complete preemption" is an action by union employees
 18 (persons employed under a collective bargaining agreement) against their employers *based on*
 19 *claims arising out of their employment relationship*. California Practice Guide, *Federal Civil*
 20 *Procedure Before Trial*, (2008) TRG, 2:7247 [emphasis added]. The Labor Management
 21 Relations Act §301(a) states: "Suits for violation of (collective bargaining contracts) ... may be
 22 brought in any district court having jurisdiction of the parties without regard to the amount in
 23 controversy or without regard to the citizenship of the parties." 29 USC §185(a); California
 24 Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:728. The statute has been
 25 interpreted as authorizing federal courts to *fashion a body of federal common law* for
 26 enforcement of collective bargaining agreements. *Textile Workers Union v. Lincoln Mills* (1957)

1 353 US 448, 455-456, 77 S.Ct. 912, 917-918; California Practice Guide, *Federal Civil*
 2 *Procedure Before Trial*, (2008) TRG, 2:729.

3 The body of federal common law authorized under LMRA §301 completely preempts
 4 state law claims based on a collective bargaining agreement: “Any such suit is *purely a creature*
 5 *of federal law*, notwithstanding the fact that state law would provide a cause of action in the
 6 absence of §301.” *Franchise Tax Board v. Construction Laborers Vacation Trust* (1983) 463 US
 7 1, 23, 103 S.Ct. 2841, 2854; California Practice Guide, *Federal Civil Procedure Before Trial*,
 8 (2008) TRG, 2:730. Complete preemption of state law is necessary because it ensures uniform
 9 interpretation of labor agreements (*Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers*
 10 *of America v. Lucas Flour Co.* (1962) 369 US 95, 103-104) and because preemption *assures that*
 11 *arbitration provisions of collective bargaining agreements* will be given the same effect in
 12 federal and state courts; i.e., so that labor law grievances “remain firmly in the arbitral realm.”
 13 *Lingle v. Norge Div. of Magic Chef* (1988) 486 US 399, 411, 108 S.Ct. 1877, 1884; California
 14 Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:731.

15 The key to determining the scope of LMRA preemption is whether resolution of the state
 16 law claim *requires the court to construe a provision* of the collective bargaining agreement.
 17 *Lingle v. Norge Div. of Magic Chef* (1988) 486 US 399, 412, 108 S.Ct. 1877, 1885. The
 18 Plaintiffs’ claim is thus the touchstone for this analysis. “The need to interpret the [collective
 19 bargaining agreement] must inhere in the nature of the plaintiff’s claim.” *Cramer v.*
 20 *Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F3d 683, 691 (en banc); *Garley v. Sandia*
 21 *Corp.* (10th Cir. 2001) 236 F3d 1200, 1208; California Practice Guide, *Federal Civil Procedure*
 22 *Before Trial*, (2008) TRG, 2:736.

23 Plaintiffs’ First Cause of Action should be dismissed: Paragraph 39 of the Complaint
 24 states that “Plaintiff Dickerson then complained to Defendants CWS, Beal [sic] and Duong and
 25 human resources manager Liu [sic] about Ramirez’s offensive sexual conduct and racial
 26 comments and asked them to put a stop to it.” See Complaint, paragraph 39. Plaintiffs’ First
 27 Cause of Action requires interpretation of the Collective Bargaining Agreement. Resolution of
 28

1 Plaintiff Dickerson's claim in the First Cause of Action necessarily depends upon the terms of
 2 the Collective Bargaining Agreement's grievance process because Plaintiff is alleging that the
 3 Defendants' conduct in "embarrassing, degrading, insulting and sexually harassing him was done
 4 in the course and scope of CWS business and while each Defendant was on duty and was only
 5 possible due to Defendants [sic] capacity as employer, manager and supervisor." See Paragraph
 6 41 of the Complaint. Plaintiff Dickerson further alleges that "Defendant CWS's failure to correct
 7 or prevent the harassment", presumably under the terms of the relevant and applicable grievance
 8 process, that therefore "...CWS acted to condone and ratify the conduct of each of the
 9 Defendants." See Paragraph 42 of the Complaint. Here, Plaintiff Dickerson is not alleging illegal
 10 conduct on the part of Defendants CWS, Beale and Duong and human resources manager Liu,
 11 but rather that they failed to act under the grievance process as outlined by the relevant
 12 Collective Bargaining Agreement which Plaintiffs attached to their Complaint as Exhibit A. See
 13 Exhibit A of Complaint. As pled, the First Cause of Action puts forth a state law claim, which is
 14 "inextricably intertwined with consideration of the terms of the labor contract." See *Allis-*
 15 *Chalmers Corp. v. Lueck* (1985) 471 US 202, 213, 105 S.Ct. 1904, 1912, *Cramer v.*
 16 *Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683 (en banc). Because Plaintiffs' First
 17 Cause of Action requires interpretation of the Collective Bargaining Agreement and because it is
 18 therefore completely preempted by federal law, Plaintiffs' First Cause of Action should be
 19 dismissed.

20 Plaintiffs' Second Cause of Action should be dismissed: Paragraph 46 of the Complaint
 21 alleges that Plaintiffs "were all employed under a contract that was partly oral, partly written and
 22 partially implied." See Paragraph 46 of the Complaint. Plaintiffs' Second Cause of Action
 23 requires interpretation of the Collective Bargaining Agreement. In *Young v. Anthony's Fish*
 24 *Grottos, Inc.* the court held that the state law breach of contract claims are preempted if the
 25 subject matter of the contract is covered by the relevant collective bargaining agreement or the
 26 employee relies on a collective bargaining agreement in asserting the contract claim. See *Young*
 27 *v. Anthony's Fish Grottos, Inc.* (9th Cir. 1987) 830 F.2d 993, 997-998, California Practice Guide,

1 *Federal Civil Procedure Before Trial*, (2008) TRG, 2:740. Paragraph 46 of the Complaint
 2 alleges “The terms of the contract relied upon by all Plaintiffs included but were not limited to a
 3 collective bargaining agreement …” As pled, the Second Cause of Action puts forth a state law
 4 claim which is “inextricably intertwined with consideration of the terms of the labor contract.”
 5 See *Allis-Chalmers Corp. v. Lueck* (1985) 471 US 202, 213, 105 S.Ct. 1904, 1912, *Cramer v.*
 6 *Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683 (en banc). Because Plaintiffs’
 7 Second Cause of Action requires interpretation of the Collective Bargaining Agreement and
 8 because it is therefore completely preempted by federal law, Plaintiffs’ Second Cause of Action
 9 should be dismissed.

10 Plaintiffs’ Third Cause of Action should be dismissed: Paragraph 54 of the Complaint
 11 alleges “The relationship between Plaintiffs and Defendant CWS was fundamentally contractual.
 12 Inherent in that contractual relationship is a covenant of good faith and fair dealing.” Plaintiffs’
 13 Third Cause of Action requires interpretation of the Collective Bargaining Agreement. In *Young*
 14 *v. Anthony’s Fish Grottos, Inc.* the court held that the state law breach of contract claims are
 15 preempted if the subject matter of the contract is covered by the relevant collective bargaining
 16 agreement or the employee relies on a collective bargaining agreement in asserting the contract
 17 claim. See *Young v. Anthony’s Fish Grottos, Inc.* (9th Cir. 1987) 830 F.2d 993, 997-998,
 18 California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:740. As pled,
 19 the Third Cause of Action puts forth a state law claim which is “inextricably intertwined with
 20 consideration of the terms of the labor contract.” See *Allis-Chalmers Corp. v. Lueck* (1985) 471
 21 US 202, 213, 105 S.Ct. 1904, 1912, *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001)
 22 255 F.3d 683 (en banc). Because Plaintiffs’ Third Cause of Action requires interpretation of the
 23 Collective Bargaining Agreement and because it is therefore completely preempted by federal
 24 law, Plaintiffs’ Third Cause of Action should be dismissed.

25 Plaintiffs’ Fourth Cause of Action should be dismissed: Paragraph 62 of the Complaint
 26 states that “The intentional act of wrongfully terminating and constructively terminating Reed
 27 and Hall by defendants and the effect on all plaintiffs was foreseeable by defendants. Plaintiffs
 28

1 have lost wages and benefits ...” The Complaint alleges in Paragraph 26 that Plaintiff Reed was
 2 “Without any verbal or written warning regarding his job performance, *in violation of his*
 3 *employment agreement* with CWS Reed was wrongfully terminated thirteen days prior to the end
 4 of his probationary period (emphasis added).” Plaintiffs’ Fourth Cause of Action requires
 5 interpretation of the Collective Bargaining Agreement. Claims by probationary employees may
 6 require interpretation of the applicable collective bargaining agreement because a union can
 7 waive the job security rights of probationary employees in order to obtain job security for more
 8 senior employees. *Hollis v. Kaiser Found. Hosps.* (9th Cir. 1984) 727 F2d 823, 825, California
 9 Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:741. As pled, the Fourth
 10 Cause of Action puts forth a state law claim which is “inextricably intertwined with
 11 consideration of the terms of the labor contract.” See *Allis-Chalmers Corp. v. Lueck* (1985) 471
 12 US 202, 213, 105 S.Ct. 1904, 1912, *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001)
 13 255 F.3d 683 (en banc). Furthermore, there is no public policy exception. A state’s public policy,
 14 no matter how strongly reflected in its statutes or case law, is no barrier to preemption under
 15 LMRA §301. *Newberry v. Pacific Racing Ass’n* (9th Cir. 1988) 854 F2d 1142, 1147-1150.
 16 Because Plaintiffs’ Fourth Cause of Action requires interpretation of the Collective Bargaining
 17 Agreement and because it is therefore completely preempted by federal law, Plaintiffs’ Fourth
 18 Cause of Action should be dismissed.

19 Plaintiffs’ Fifth Cause of Action should be dismissed: Paragraph 67 of the Complaint
 20 alleges that “As a direct and proximate result of defendants’ constructive termination of plaintiff
 21 Hall in violation of *federal* and state laws and public policy plaintiff lost and will continue to
 22 lose income and benefits (emphasis added).” Plaintiffs’ Fifth Cause of Action requires
 23 interpretation of the Collective Bargaining Agreement. The allegation of constructive
 24 termination necessarily will, at the very least, involve consideration and possible interpretation of
 25 the applicable collective bargaining agreement, as opposed to “merely looking to” the collective
 26 bargaining agreement. *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683
 27 (en banc). As pled, the Fifth Cause of Action puts forth a state law claim that is “inextricably
 28

1 intertwined with consideration of the terms of the labor contract.” See *Allis-Chalmers Corp. v.*
 2 *Lueck* (1985) 471 US 202, 213, 105 S.Ct. 1904, 1912, *Cramer v. Consolidated Freightways, Inc.*
 3 (9th Cir. 2001) 255 F.3d 683 (en banc). Because Plaintiffs’ Fifth Cause of Action requires
 4 interpretation of the Collective Bargaining Agreement and because it is therefore completely
 5 preempted by federal law, Plaintiffs’ Fifth Cause of Action should be dismissed.

6 Plaintiffs’ Sixth Cause of Action should be dismissed: Paragraph 70 of the Complaint
 7 alleges that “Defendants CWS, Jimmy Doung and Does 1-50 retaliated against Plaintiff Reed in
 8 violation of *federal* and state law, public policy and CWS’s *contract* with him by engaging in
 9 retaliatory conduct and continuing that conduct along with employees in CWS [sic] human
 10 resources department until he was terminated without cause and in violation of *federal* and state
 11 laws and with *agreements* Plaintiff had with defendant CWS (emphasis added).” The Complaint
 12 alleges in Paragraph 26 that Plaintiff Reed was “Without any verbal or written warning regarding
 13 his job performance, *in violation of his employment agreement* with CWS Reed was wrongfully
 14 terminated thirteen days prior to the end of his probationary period (emphasis added).” Plaintiffs’
 15 Sixth Cause of Action requires interpretation of the Collective Bargaining Agreement. Claims by
 16 probationary employees may require interpretation of the applicable collective bargaining
 17 agreement because a union can waive the job security rights of probationary employees in order
 18 to obtain job security for more senior employees. *Hollis v. Kaiser Found. Hosps.* (9th Cir. 1984)
 19 727 F2d 823, 825, California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG,
 20 2:741. As pled, the Sixth Cause of Action puts forth a state law claim that is “inextricably
 21 intertwined with consideration of the terms of the labor contract.” See *Allis-Chalmers Corp. v.*
 22 *Lueck* (1985) 471 US 202, 213, 105 S.Ct. 1904, 1912, *Cramer v. Consolidated Freightways, Inc.*
 23 (9th Cir. 2001) 255 F.3d 683 (en banc). Because Plaintiffs’ Sixth Cause of Action requires
 24 interpretation of the Collective Bargaining Agreement and because it is therefore completely
 25 preempted by federal law, Plaintiffs’ Sixth Cause of Action should be dismissed.

26 Plaintiffs’ Seventh Cause of Action should be dismissed: Paragraph 72 of the Complaint
 27 alleges that “CWS’s failure to correct the conduct of Ramirez, Duong and Liu [sic] as alleged in
 28

1 the first, second, third, fifth and sixth causes of action of this complaint was deliberate and
 2 willful and done in reckless disregard of causing Plaintiffs emotional distress.” Plaintiffs’
 3 Seventh Cause of Action requires interpretation of the Collective Bargaining Agreement. Claims
 4 of emotional distress may require interpretation of the applicable collective bargaining
 5 agreement because such claims are incidental to the alleged wrongful discharge; whether or not
 6 the alleged discharge is “wrongful” depends upon the terms of the applicable collective
 7 bargaining agreement provide grounds for discharge. See *Newberry v. Pacific Racing Ass’n* (9th
 8 Cir. 1988) 854 F2d 1142, 1147, California Practice Guide, *Federal Civil Procedure Before Trial*,
 9 (2008) TRG, 2:745. As pled, the Seventh Cause of Action puts forth a state law claim that is
 10 “inextricably intertwined with consideration of the terms of the labor contract.” See *Allis-*
 11 *Chalmers Corp. v. Lueck* (1985) 471 US 202, 213, 105 S.Ct. 1904, 1912, *Cramer v.*
 12 *Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683 (en banc). Because Plaintiffs’
 13 Seventh Cause of Action requires interpretation of the Collective Bargaining Agreement and
 14 because it is therefore completely preempted by federal law, Plaintiffs’ Seventh Cause of Action
 15 should be dismissed.

16 Plaintiffs’ Eighth Cause of Action should be dismissed: Paragraph 79 of the Complaint
 17 alleges that “Defendant Grogan falsified events and accused Brown of a crime in an effort to
 18 terminate him or force him to resign and made knowingly false statements to third parties
 19 regarding the personnel file of Brown.” Plaintiffs’ Eighth Cause of Action requires interpretation
 20 of the Collective Bargaining Agreement. State law defamation claims based on an employer’s
 21 statements may require interpretation of the applicable collective bargaining agreement because
 22 such statements and communications may have been made in relation to the grievance
 23 proceedings or in communications required by the collective bargaining agreement. See, e.g.,
 24 *Tellez v. Pacific Gas & Elec. Co., Inc.* (9th Cir. 1987) 817 F2d 536, 538. As pled, the Eighth
 25 Cause of Action puts forth a state law claim that is “inextricably intertwined with consideration
 26 of the terms of the labor contract.” See *Allis-Chalmers Corp. v. Lueck* (1985) 471 US 202, 213,
 27 105 S.Ct. 1904, 1912, *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683

1 (en banc). Because Plaintiffs' Eighth Cause of Action requires interpretation of the Collective
 2 Bargaining Agreement and because it is therefore completely preempted by federal law,
 3 Plaintiffs' Eighth Cause of Action should be dismissed.

4 Plaintiffs' Tenth Cause of Action should be dismissed: The Tenth Cause of Action
 5 alleges retaliation on the part of all defendants as to all plaintiffs and Paragraph 85 of the
 6 Complaint alleges that "Defendants' [sic] responded by criticism, demotion, unfavorable
 7 reassignment and termination, both actual and constructive, of plaintiffs, all of which is
 8 unlawful." Paragraph 85 states that as a proximate result of the Defendants' conduct that
 9 "Plaintiffs continue to suffer emotional distress, humiliation, mental and physical injury in an
 10 amount according to proof." Plaintiffs' Tenth Cause of Action requires interpretation of the
 11 Collective Bargaining Agreement. Claims of emotional distress may require interpretation of the
 12 applicable collective bargaining agreement because such claims are incidental to the alleged
 13 wrongful discharge; whether or not the alleged discharge is "wrongful" depends upon the terms
 14 of the applicable collective bargaining agreement provide grounds for discharge. See *Newberry*
 15 v. *Pacific Racing Ass'n* (9th Cir. 1988) 854 F2d 1142, 1147, California Practice Guide, *Federal*
 16 *Civil Procedure Before Trial*, (2008) TRG, 2:745. The Complaint alleges in Paragraph 26 that
 17 Plaintiff Reed was "Without any verbal or written warning regarding his job performance, *in*
 18 *violation of his employment agreement* with CWS Reed was wrongfully terminated thirteen days
 19 prior to the end of his probationary period (emphasis added)." Claims by probationary employees
 20 may require interpretation of the applicable collective bargaining agreement because a union can
 21 waive the job security rights of probationary employees in order to obtain job security for more
 22 senior employees. *Hollis v. Kaiser Found. Hosps.* (9th Cir. 1984) 727 F2d 823, 825, California
 23 Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:741. As pled, the Tenth
 24 Cause of Action puts forth a state law claim that is "inextricably intertwined with consideration
 25 of the terms of the labor contract." See *Allis-Chalmers Corp. v. Lueck* (1985) 471 US 202, 213,
 26 105 S.Ct. 1904, 1912, *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683
 27 (en banc). Because Plaintiffs' Tenth Cause of Action requires interpretation of the Collective
 28

1 Bargaining Agreement and because it is therefore completely preempted by federal law,
 2 Plaintiffs' Tenth Cause of Action should be dismissed.

3 **D. PLAINTIFFS HAVE FAILED TO ALLEGE AND CANNOT ALLEGE
 4 THAT THEY EXHAUSTED ALL THEIR REMEDIES UNDER THE CBA**

5 Unless the court converts a Rule 12(b)(6) motion into a summary judgment motion, or
 6 the defense is apparent from matters of which a court may take judicial notice, the court cannot
 7 consider material outside the complaint (e.g., facts presented in briefs, affidavits or discovery
 8 materials). *Arpin v. Santa Clara Valley Transp. Agency* (9th Cir. 2001) 261 F3d 912, 925;
 9 California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 9:211. Here, the
 10 Plaintiffs have failed to allege in their Complaint that they have exhausted all their remedies
 11 under the collective bargaining agreement, which is attached to Plaintiffs' Complaint as Exhibit
 12 A.

13 In *Young v. Anthony's Fish Grottos, Inc.*, *supra*, union employees sued their employer in
 14 state court for wrongful discharge. The case was properly removed to federal court because the
 15 state law claims *were completely preempted* by the claim provided under federal labor law.
 16 Labor Management Relations Act §301; California Practice Guide, *Federal Civil Procedure
 Before Trial*, (2008) TRG, 2:725. The federal claim was, however, *barred* by the employee's
 17 failure to exhaust the grievance procedure under the collective bargaining agreement (or to assert
 18 the claim within the statute of limitations). Accordingly, summary judgment in favor of the
 19 employer was proper. See *Young v. Anthony's Fish Grottos, Inc.*, *supra*, 830 F2d 993 at 999;
 20 California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:725.

22 *Dismissal*, not remand, is appropriate where, after removal based on complete
 23 preemption, a claim within the exclusive jurisdiction of federal court fails. See *Dielsi v. Falk*
 24 (CD CA 1996) 916 F.Supp.985, 993-994; *Peters v. Union Pac. R. Co.* (8th Cir. 1996) 80 F.3d
 25 257, 262—claim preempted but dismissed for failure to exhaust remedies; California Practice
 26 Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:726.14a.

1 Here, Plaintiffs' Complaint never alleges that *any* of the Plaintiffs participated in the
 2 grievance process outlined in the pertinent collective bargaining agreement. Paragraphs 1–33 of
 3 the Complaint each fail to allege that any of the Plaintiffs exhausted their remedies under the
 4 grievance and/or arbitration articles of the collective bargaining agreement. Paragraph 30 of the
 5 Complaint alleges that Plaintiff "Brown previously filed a claim against CWS and prevailed at
 6 arbitration." However, the Complaint filed by Plaintiffs is silent regarding any grievance or
 7 arbitration relating to the issues, allegations and/or to the causes of action contained in the
 8 Complaint.

9 Even statutory discrimination claims must be submitted to arbitration where the
 10 collective bargaining agreement contains an arbitration clause that "clearly and unmistakably"
 11 covers all federal causes of action arising out of employment. *Wright v. Universal Maritime*
 12 *Service Corp.* (1998) 525 US 70, 80, 119 S.Ct. 391, 396; California Practice Guide, *Employment*
 13 *Litigation*, (2007) TRG, 16:356. A collective bargaining agreement that expressly requires
 14 arbitration of the union members' statutory discrimination claims waives their right to sue
 15 individually on such claims. *Carson v. Giant Food, Inc.* (4th Cir. 1999) 175 F3d 325, 331-332;
 16 *Bratten v. SSI Services, Inc.* (6th Cir. 1999) 185 F3d 625, 631; California Practice Guide,
 17 *Employment Litigation*, (2007) TRG, 16:357.

18 **E. IN THE ALTERNATIVE, PLAINTIFFS' CLAIM IS SUBJECT TO
 19 MANDATORY ARBITRATION UNDER THE CBA**

20 Similarly, the Plaintiffs each fail to allege that any of them submitted any of their
 21 grievances to arbitration as required under the relevant collective bargaining agreement.
 22 Paragraph 30 of the Complaint alleges that Plaintiff "Brown previously filed a claim against
 23 CWS and prevailed at arbitration." Complete preemption of state law is necessary because it
 24 ensures uniform interpretation of labor agreements (*Local 174, Teamsters, Chauffeurs,*
 25 *Warehousemen & Helpers of America v. Lucas Flour Co.* (1962) 369 US 95, 103-104) and
 26 because preemption *assures that arbitration provisions of collective bargaining agreements* will
 27 be given the same effect in federal and state courts; i.e., so that labor law grievances "remain

1 firmly in the arbitral realm.” *Lingle v. Norge Div. of Magic Chef* (1988) 486 US 399, 411, 108
 2 S.Ct. 1877, 1884; California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG,
 3 2:731. At least one of the Plaintiffs, Plaintiff Brown, had successfully resolved a grievance prior
 4 to the filing of this Complaint. However, the Plaintiffs fail to allege that they have exhausted
 5 their remedies under the collective bargaining agreement prior to filing the Complaint, and also
 6 fail to provide any justification for failing to comply with the requirements of the collective
 7 bargaining agreement regarding grievances.

8 Even statutory discrimination claims must be submitted to arbitration where the
 9 collective bargaining agreement contains an arbitration clause that “clearly and unmistakably”
 10 covers all federal causes of action arising out of employment. *Wright v. Universal Maritime*
 11 *Service Corp.* (1998) 525 US 70, 80, 119 S.Ct. 391, 396; California Practice Guide, *Employment*
 12 *Litigation*, (2007) TRG, 16:356. A collective bargaining agreement that expressly requires
 13 arbitration of the union members’ statutory discrimination claims waives their right to sue
 14 individually on such claims. *Carson v. Giant Food, Inc.* (4th Cir. 1999) 175 F3d 325, 331-332;
 15 *Bratten v. SSI Services, Inc.* (6th Cir. 1999) 185 F3d 625, 631; California Practice Guide,
 16 *Employment Litigation*, (2007) TRG, 16:357.

17 Article 14, Grievance Procedure, of the “Agreement between Brotherhood of Teamsters,
 18 Local No. 70 and California Waste Solutions” states that “[t]he grievance procedure is intended
 19 to be the primary forum for resolution of any grievance, money claim or dispute arguably
 20 covered by the collective bargaining agreement, and the exclusive forum to the fullest extent
 21 permitted by law.” See Exhibit A of the Complaint. Even statutory discrimination claims must be
 22 submitted to arbitration where the collective bargaining agreement contains an arbitration clause
 23 that “clearly and unmistakably” covers all federal causes of action arising out of employment.
 24 *Wright v. Universal Maritime Service Corp.* (1998) 525 US 70, 80, 119 S.Ct. 391, 396;
 25 California Practice Guide, *Employment Litigation*, (2007) TRG, 16:356.

26 ///

F. TO THE EXTENT THAT THEIR EMPLOYMENT REMEDIES ARE EXCLUSIVE UNDER THE CBA, PLAINTIFFS' CLAIMS MUST BE DISMISSED

Here, the Plaintiffs have failed to allege in their Complaint that they have exhausted all their remedies under the collective bargaining agreement, which is attached to Plaintiffs' Complaint as Exhibit A.

In *Young v. Anthony's Fish Grottos, Inc.*, *supra*, union employees sued their employer in state court for wrongful discharge. The case was properly removed to federal court because the state law claims were *completely preempted* by the claim provided under federal labor law. Labor Management Relations Act §301; California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:725. The federal claim was, however, *barred* by the employee's failure to exhaust the grievance procedure under the collective bargaining agreement (or to assert the claim within the statute of limitations). Accordingly, summary judgment in favor of the employer was proper. See *Young v. Anthony's Fish Grottos, Inc.*, *supra*, 830 F2d 993 at 999; California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:725.

Dismissal, not remand, is appropriate where, after removal based on complete preemption, a claim within the exclusive jurisdiction of federal court fails. See *Dielsi v. Falk* (CD CA 1996) 916 F.Supp.985, 993-994; *Peters v. Union Pac. R. Co.* (8th Cir. 1996) 80 F.3d 257, 262—claim preempted but dismissed for failure to exhaust remedies; California Practice Guide, *Federal Civil Procedure Before Trial*, (2008) TRG, 2:726.14a.

Here, Plaintiffs' Complaint never alleges that *any* of the Plaintiffs participated in the grievance process outlined in the pertinent collective bargaining agreement. Paragraphs 1–33 each fail to allege that any of the Plaintiffs exhausted their remedies under the grievance and/or arbitration articles of the collective bargaining agreement. Paragraph 30 of the Complaint alleges that Plaintiff "Brown previously filed a claim against CWS and prevailed at arbitration." However, the Complaint filed by Plaintiffs is silent regarding any grievance or arbitration relating to the issues, allegations and/or to the causes of action contained in the Complaint. Even statutory discrimination claims must be submitted to arbitration where the collective bargaining

1 agreement contains an arbitration clause that “clearly and unmistakably” covers all federal
 2 causes of action arising out of employment. *Wright v. Universal Maritime Service Corp.* (1998)
 3 525 US 70, 80, 119 S.Ct. 391, 396; California Practice Guide, *Employment Litigation*, (2007)
 4 TRG, 16:356. A collective bargaining agreement that expressly requires arbitration of the union
 5 members’ statutory discrimination claims waives their right to sue individually on such claims.
 6 *Carson v. Giant Food, Inc.* (4th Cir. 1999) 175 F3d 325, 331-332; *Bratten v. SSI Services, Inc.*
 7 (6th Cir. 1999) 185 F3d 625, 631; California Practice Guide, *Employment Litigation*, (2007)
 8 TRG, 16:357.

9 Article 14, Grievance Procedure, of the “Agreement between Brotherhood of Teamsters,
 10 Local No. 70 and California Waste Solutions” states that “[t]he grievance procedure is intended
 11 to be the primary forum for resolution of any grievance, money claim or dispute arguably
 12 covered by the collective bargaining agreement, and the exclusive forum to the fullest extent
 13 permitted by law.” See Exhibit A of the Complaint. Even statutory discrimination claims must be
 14 submitted to arbitration where the collective bargaining agreement contains an arbitration clause
 15 that “clearly and unmistakably” covers all federal causes of action arising out of employment.
 16 *Wright v. Universal Maritime Service Corp.* (1998) 525 US 70, 80, 119 S.Ct. 391, 396;
 17 California Practice Guide, *Employment Litigation*, (2007) TRG, 16:356.

18 **G. PLAINTIFF DICKERSON’S CLAIMS FOR HOSTILE WORK
 19 ENVIRONMENT AND SEXUAL BATTERY DO NOT RISE TO THE
 20 LEVEL OF ACTIONABLE CLAIMS; HORSEPLAY DOES NOT EQUAL
 21 “HARRASSMENT.”**

22 Genuine but innocuous interactions in the workplace are not actionable. Simple “teasing”
 23 and offhand comments do not amount to discriminatory changes in the terms and conditions of
 24 employment. *Faragher v. City of Boca Raton* (1998) 524 US 775, 787, 118 S.Ct. 2275, 2283;
 25 California Practice Guide, *Employment Litigation*, (2007) TRG, 10:162. “[T]he ordinary
 26 tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes,
 27 and occasional teasing” is not actionable harassment. *Faragher v. City of Boca Raton* (1998) 524
 28 US 775, 788, 118 S.Ct. 2275, 2284; California Practice Guide, *Employment Litigation*, (2007)

1 TRG, 10:163 “Isolated instances (unless extremely serious) will not amount to a discriminatory
 2 change in the terms and conditions of employment.” *Faragher v. City of Boca Raton* (1998) 524
 3 US 775, 788, 118 S.Ct. 2275, 2283; California Practice Guide, *Employment Litigation*, (2007)
 4 TRG, 10:165.

5 The nature of the misconduct (e.g. whether mere comments or “sexual horseplay” or a
 6 sexual assault) is clearly relevant to whether a hostile environment exists. *Candelore v. Clark*
 7 *County Sanitation Dist.* (9th Cir. 1992) 975 F2d 588, 590—isolated instances of “sexual
 8 horseplay” over a period of years not sufficiently egregious to render work environment hostile;
 9 California Practice Guide, *Employment Litigation*, (2007) TRG, 10:174. In *Brooks v. City of San*
 10 *Mateo*, (9th Cir. 2000) 229 F3d 917, the district court held that a single instance of fondling,
 11 though “highly reprehensible” and “unsavory” did not rise to the level of severity and
 12 pervasiveness required to constitute a hostile work environment under federal law. The court of
 13 appeal, in a decision where employers gained protection from single-episode harassment claims,
 14 affirmed the district court’s grant of summary judgment for the defendant. *Brooks v. City of San*
 15 *Mateo*, *supra*, 229 F3d at p. 923. In *Linville v. Sears, Roebuck & Co.*, (8th Cir. 2003) 335 F3d
 16 822, the lower court granted summary judgment against a male plaintiff who sued for same-sex
 17 harassment after a coworker, in an act of horseplay, hit the plaintiff in the crotch several times.
 18 On appeal the judgment was upheld because the plaintiff failed to present evidence that the
 19 coworker’s actions were based on sex or gender. *Linville v. Sears, Roebuck & Co.*, *supra*, 335
 20 F3d at p. 826.

21 Here, in Paragraphs 18 and 19 of their Complaint, the Plaintiffs allege that, on December
 22 6, 2007, Defendant Ramirez “grabbed [Plaintiff Dickerson] inappropriately on his backside” and
 23 that “[l]ater that same day, while Dickerson was preparing to go home, Defendant Ramirez, in
 24 the presence of others including employees of CWS, again engaged in inappropriate touching by
 25 jumping on the back of Plaintiff Dickerson’s motorcycle, while Dickerson was about to pull off
 26 and attempted to grab and touch Dickerson between his legs.” These allegations of horseplay,
 27 taking place on the same day, do not rise to the level of severity and pervasiveness to be
 28

1 actionable, nor can they, under the relevant case law, be construed to constitute a hostile work
 2 environment. Therefore, the First, Second, Fourth, Seventh and Tenth Causes of Action must be
 3 dismissed.

4 **H. PLAINTIFFS DO NOT ALLEGE AND CANNOT ALLEGE THAT THEY
 EXHAUSTED ALL THEIR ADMINISTRATIVE REMEDIES**

5 While employees need not exhaust the employer's internal grievance process under Title
 6 VII or the Fair Employment and Housing Act (FEHA), the employee does need to exhaust the
 7 administrative remedy under these statutes by obtaining the appropriate right-to-sue letter from
 8 the Equal Employment Opportunity Commission (EEOC) or the Department of Fair
 9 Employment and Housing (DFEH). *EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F2d 1504,
 10 1516 (Title VII action) (overruled on other grounds in *Burrell v Star Nursery, Inc.*, (9th Cir.
 11 1999) 170 F3d 951); *Schifando v. City of Los Angeles* (2003) 31 C4th 1074, 1080, 6 CR3d 457,
 12 459 (FEHA action); California Practice Guide, *Employment Litigation*, (2007) TRG, 16:371.

13 Here, the Plaintiffs have failed to allege in their Complaint that they have exhausted all
 14 their administrative remedies.

15 **I. PLAINTIFF REED'S CLAIM MUST BE DISMISSED, AS HE ADMITS IN
 HIS COMPLAINT THAT HE WAS TERMINATED PURSUANT TO THE
 TERMS OF HIS PROBATION; HE WAS AN AT-WILL EMPLOYEE**

16 The Complaint alleges in Paragraph 26 that Plaintiff Reed was "Without any verbal or
 17 written warning regarding his job performance, *in violation of his employment agreement* with
 18 CWS Reed was wrongfully terminated thirteen days prior to the end of his probationary period
 19 (emphasis added)." As a new employee Plaintiff Reed was serving a probationary period, and as
 20 such, was an at-will employee. Claims by probationary employees may require interpretation of
 21 the applicable collective bargaining agreement because a union can waive the job security rights
 22 of probationary employees in order to obtain job security for more senior employees. *Hollis v.*
 23 *Kaiser Found. Hosps.* (9th Cir. 1984) 727 F2d 823, 825, California Practice Guide, *Federal Civil*
 24 *Procedure Before Trial*, (2008) TRG, 2:741. As pled, the Tenth Cause of Action puts forth a
 25 state law claim that is "inextricably intertwined with consideration of the terms of the labor
 26

1 contract." See *Allis-Chalmers Corp. v. Lueck* (1985) 471 US 202, 213, 105 S.Ct. 1904, 1912,
 2 *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683 (en banc). Because
 3 Plaintiff Reed's allegations require interpretation of the Collective Bargaining Agreement and
 4 because they are therefore completely preempted by federal law, Plaintiff Reed's allegations
 5 should be dismissed.

6 **J. PLAINTIFFS' DEMAND FOR ATTORNEYS' FEES MUST BE
 7 STRICKEN**

8 A motion to strike may be used to strike the prayer for relief where the damages sought
 9 are not recoverable as a matter of law. Prayers for attorney fees in actions where these are not
 10 recoverable as a matter of law, are properly the subject of a motion to strike. *Wilkerson v. Butler*
 11 (ED CA 2005) 229 FRD 166, 172 (citing text); California Practice Guide, *Federal Civil*
 12 *Procedure Before Trial*, (2008) TRG, 9:390. Here, no attorney's fees are recoverable because the
 13 state law claims for violation of public policy must be dismissed. All other claims upon which a
 14 claim for reasonable attorney's fees and/or costs must, as well, be dismissed, and therefore
 15 attorney's fees and/or costs are not recoverable as a matter of law. *Wilkerson v. Butler* (ED CA
 16 2005) 229 FRD 166, 172 (citing text); California Practice Guide, *Federal Civil Procedure Before*
 17 *Trial*, (2008) TRG, 9:390.

18 **III. CONCLUSION**

20 For the foregoing reasons, the Court is respectfully requested to issue an order dismissing
 21 the plaintiff's complaint, without leave to amend. In the alternative, if any claims are deemed to
 22 be viable, then they are subject to mandatory arbitration and this Court is respectfully requested
 23 to order that all remaining claims be ordered to arbitration.

24 Dated: August 12, 2008

LAW OFFICES OF WALLACE C. DOOLITTLE

25
 26 _____/S/_____
 27 Wallace C. Doolittle, Esq.,
 28 Attorneys for all Defendants

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10 Attorneys for Defendants CALIFORNIA WASTE SOLUTIONS, INC., a California corporation
11 (sued incorrectly herein as "CAL WASTE SOLUTIONS"), JIMMY DUONG, RUTH LIU (sued
12 incorrectly as "RUTH LUI"), OSCAR RAMIREZ, STAN BEALE (sued incorrectly herein as
13 "STAN BEAL") and RICH GROGAN

14
15
16
17 UNITED STATES DISTRICT COURT
18
19 NORTHERN DISTRICT OF CALIFORNIA
20
21 (Oakland Division)

22 REGINALD DICKERSON, LLOYD HALL,
23 BRANDON REED AND HARRISON
24 BROWN,

25 Plaintiffs,

26 v.

27 CAL WASTE SOLUTIONS, JIMMY
28 DUONG, RUTH LUI, OSCAR RAMIREZ,
DOES 1-
50,

Defendants.

Case No. **CV 08 3773 WDB**

**[PROPOSED] ORDER GRANTING
MOTION TO DISMISS PURSUANT TO
F.R.C.P. 12(B)(6), OR, IN THE
ALTERNATIVE, TO COMPEL
ARBITRATION**

Date: October 2, 2008

Time: 1:30 p.m.

Dept: Courtroom 4, 3rd Floor, 1301 Clay
Street, Oakland, CA 94612

Complaint filed: July 18, 2008

Trial date: None

1 The Motion of Defendants pursuant to F.R.C.P., Rule 12(b)(6) to dismiss, or, in the
2 alternative, to compel arbitration, came on regularly for hearing on October 2, 2008 in
3 Courtroom 4, 3rd Floor, located at 1301 Clay Street, Oakland, CA 94612 before the Honorable
4 Judge _____ presiding. Wallace C. Doolittle appeared on behalf of all Defendants.
5 Angela Morgan appeared on behalf of Plaintiffs.
6

7 Good cause appearing therefore, the Court, hereby makes the following findings and
8 order:

9 (1) Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth
10 Cause of Action are hereby dismissed as, among other things, Plaintiffs have failed to exhaust
11 their grievance remedies under the Teamsters Collective Bargaining Agreement, these Plaintiffs
12 have failed to allege exhaustion of their administrative remedies, and have further failed to state
13 legally cognizable causes of action for sexual harassment, hostile work environment and sexual
14 battery;

15 [or]

16 (2) arbitration is mandatory under the Collective Bargaining Agreement and therefore
17 although the Court is not inclined to dismiss this matter, the Court is nevertheless orders the
18 matter to arbitration. The matter is therefore stayed and held in abeyance.
19

20 Dated: _____, 2008
21
22
23

24 Judge of the United States District Court
25 Northern District of California
26
27
28

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Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(Oakland Division)

REGINALD DICKERSON, LLOYD HALL,
BRANDON REED and HARRISON BROWN.

Case No. CV 08-3773 WDB

Plaintiffs,

PROOF OF SERVICE BY E-MAIL WITH
A COPY BY MESSENGER

Defendants.

1 **PROOF OF SERVICE BY E-MAIL WITH COPY BY MESSENGER**

2 I, the undersigned, declare:

3 I am employed in the City of Hayward and County of Alameda, State of California.
4 I am over the age of 18 and not a party to the within entitled cause; my business address is 1260 B
5 Street, Suite 220, Hayward, California 94541. On **August 12, 2008**, I served the foregoing
6 document(s) entitled:

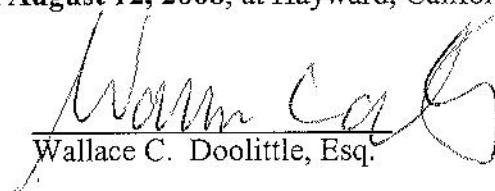
7 **NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FRCP 12(B)6, OR, IN
8 THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION; MEMORANDUM OF
9 POINTS AND AUTHORITIES; PROPOSED ORDER; DECLINATION TO PROCEED
10 BEFORE UNITED STATES MAGISTRATE**

11 on the person(s)/attorney(s) of record in said cause by serving them by e-mail, with a hard-copy to be
12 delivered by messenger on August 13, 2008 to:

13 Angela L. Morgan, Esq.
14 MORGAN & ASSOCIATES
15 7677 Oakport Street, #1050
16 Oakland, CA 94621-1932

17 e-mail: almorgan@sbcglobal.net

18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct. Executed on **August 12, 2008**, at Hayward, California.

20 
21 _____
22 Wallace C. Doolittle, Esq.